No. 06-652

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In The
Supreme Court of the United States

BART DIDDEN, DOMENICK BOLOGNA,
CABERNET 119 REALTY CORP., OPUS 113 CORP.,
PAUILLAC 115 REALTY CORP.,
AND 117 NORTH MAIN STREET CORP.,

Petitioners,

v.

THE VILLAGE OF PORT CHESTER, et al.,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

REPLY BRIEF OF PETITIONERS

KEANE & BEANE P.C.
EDWARD J. PHILLIPS
RICHARD L. O'ROURKE
455 Hamilton Avenue
15th Floor
White Plains, NY 10601
(914) 946-4777

INSTITUTE FOR JUSTICE
WILLIAM H. MELLOR
DANA BERLINER*
SCOTT G. BULLOCK
ROBERT MCNAMARA
901 North Glebe Road
Suite 900
Arlington, VA 22203
(703) 682-9320

Counsel for Petitioners

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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The Respondents' opposition brief makes abundantly clear that review is needed by this Court. Respondents do not actually challenge Petitioners' interpretation of the import of the Second Circuit's decision. But they clearly believe there is nothing wrong with private developers, acting with the authority and support of government, demanding cash from property owners in exchange for not taking their land. That is a startling proposition that, until now, could not be seriously asserted on the basis of existing case law.

Rather than addressing whether this case presents an appropriate vehicle for this Court to clarify the application of *Kelo* and to resolve a judicial split about cash exactions, Respondents put forward a flurry of imaginary procedural barriers to hearing the merits of this case. To name a few, Respondents incorrectly claim that Petitioners failed to plead various matters; that a time-bar on claims arising in 1999 would bar a 2003 cause of action; that this Court should not review unpublished appellate decisions; and that they may argue facts not in the pleadings on a motion to dismiss. Perhaps Respondents hope that by obscuring the issues sufficiently, the Court wil be convinced that this case is actually a complicated one. It is not. Unfortunately, Petitioners have had to respond to demonstrate why the various contentions are factually or legally incorrect. This Court should not get the impression, however, that the time spent responding indicates that any of these supposed concerns has the slightest legal merit.

Petitioners' case is quite simple. They have alleged that in 2003 a developer, acting on behalf of a municipal body, demanded cash in exchange for not taking their land. When Petitioners refused, their property was condemned the following day. The courts below held that these facts did not give rise to a claim of private purpose or pretextual condemnation and that there was no exaction; the case was dismissed under FRCP 12(b)(6). That is the whole of the case before this Court, and the issues that Petitioners have asked this Court to resolve are equally direct: (1) Was the Second Circuit correct that *Kelo v. City of New London*, 125 S. Ct. 2655 (2005), precludes Petitioners from raising a claim of condemnation for private purpose because their property was situated within a redevelopment area? and

(2) Was the Second Circuit correct that these facts do not give rise to a claim of unconstitutional exaction? This case presents a clean vehicle for analyzing each of these claims. This Court should accept review.

I. THIS COURT SHOULD GRANT REVIEW TO CLARIFY THE APPLICATION OF *KELO* TO PURELY PRIVATE AND PRETEXTUAL TAKINGS WITHIN REDEVELOPMENT AREAS.

While purporting to disavow the idea that redevelopment designations create constitution-free zones, Respondents emphasize, over and over, that Petitioners did not challenge the original 1999 designation. Petitioners agree – they did not challenge the original designation. From their brief, it seems Respondents cannot even understand that Petitioners are attempting to challenge not the original designation, but later events. Because Petitioners sought to argue that the condemnation of their property in 2003 was for a purely private purpose and that any claim of public purpose was pretextual, any statute of limitations relating to events occurring in 1999 is irrelevant.

A. There Is No Statute Of Limitations Issue, Because Petitioners Wish To Bring A Constitutional Challenge To Events That Occurred In 2003.[1]

Respondents claim, incorrectly, that there is no point to the Court's review, because even if the Court ruled in Petitioners' favor, the Second Circuit's ruling that the public purpose claim is time-barred would remain an independent grounds for dismissal.[2] Resp. Br. 10-13. In fact, however,

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[1] The statute of limitations for actions under 28 U.S.C. § 1983 in New York is three years. *Patterson v. County of Oneida*, 375 F.3d 206, 225 (2d Cir. 2004).

[2] Although Respondents seem to say that the entire action should be time-barred, the Second Circuit's statute of limitations ruling applies only to the public purpose challenge, not to the exaction challenge. *See*

(Continued on following page)

Petitioners have asked this Court to determine whether the attempted extortion and associated events *of 2003* give rise to a cause of action. If Petitioners have claims arising in 2003, then the Second Circuit's ruling that 1999 claims are time-barred is simply irrelevant. The Second Circuit's decision that Petitioners' claims were time-barred is necessarily based on its holding that Petitioners *had no claims arising in 2003*. In other words, the Second Circuit found that Petitioners could not challenge the specific taking in 2003 because they were bound by the 1999 determination of public purpose, and any challenge to the 1999 redevelopment designation was barred by the statute of limitations.[3] *See* Pet. Br. 7-8. *See also* Br. for Law Professors as *Amici Curiae* 14 (explaining that it is unreasonable to expect Petitioners to predict in 1999 that there will be an attempt at extortion and condemnation for private purpose in 2003).

Put another way, the statute of limitations ruling derives entirely from the substantive holding that pretextual, purely private purpose takings in a redevelopment area are constitutionally permissible under *Kelo*. The Second Circuit held that the public purpose of any possible condemnations was established, conclusively and as a matter of law, in 1999 and any challenge to the public

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Didden v. Vill. of Port Chester, 173 Fed. Appx. 931, 933 (2d Cir. 2006) (holding that there was no "unconstitutional exaction"). Respondents' specious arguments about the statute of limitations should be summarily rejected as to the public purpose challenge, but they cannot even be imagined to have any relevance to the exaction claim.

[3] Respondents' attempt to analogize this case to *Paschall v. Christie-Stewart, Inc.*, 414 U.S. 100 (1973) is unavailing. In *Paschall*, the Court remanded for consideration of a statute of limitations issue that had gone completely unnoticed in the state appeal and supreme courts. Since it had not been ruled upon by the earlier courts or briefed before this Court, it was appropriate to remand for lower courts to rule on in the first instance. *See* 414 U.S. at 100-102. Here, in contrast, the issue has been considered by the lower courts and the briefs, and Petitioners have repeatedly explained that the statute of limitations ruling does not affect the constitutional questions raised by Respondents' actions in 2003. *See Didden*, 173 Fed. Appx. at 933.

purpose was thus barred by the statute of limitations. *Didden*, 173 Fed. Appx. at 933. If an owner wants to challenge the public purpose of taking his property, therefore, the only legal option is to argue that the redevelopment designation is invalid and the entire project lacks a public purpose. That legal option – and therefore all legal options – apparently vanishes with the passing of the three-year statute of limitations. Since an owner cannot argue that a particular condemnation within a redevelopment area is for a private purpose and pretextual, Petitioners have no public use claim regarding the $800,000 demand in 2003.

In short, the Second Circuit's statute of limitations holding depends entirely on the substantive conclusion that the only way to challenge a condemnation within a redevelopment plan area is to challenge the original designation itself. Respondents cannot prevail on the statute of limitations issue without first prevailing on the substantive question of whether pretextual takings in a redevelopment area are permissible; the time bar is not and cannot be an independent reason for dismissing the Petitioners' cause of action.

Respondents' pages of discussion about live controversy, mootness and independent state law grounds are all simply beside the point. *See* Resp. Br. 10-13. Either Petitioners may bring a challenge that the condemnation of their particular property was pretextual and wholly lacking in public purpose (in which case there is no statute of limitations problem because the relevant events took place in 2003) or they may not bring such a challenge (in which case they are time-barred because they did not challenge the overall redevelopment designation in 1999). The fact that any claims arising in 1999 are now time-barred has nothing to do with whether Petitioners have claims arising in 2003.

B. The Fact That The Decision Is Unpublished Should Not Dissuade This Court From Granting Review.

Respondents also argue that the Court has no need to grant certiorari because the Second Circuit's decision has no precedential value. *See* Resp. Br. 14-15. This

argument has no merit. This Court grants review to unpublished decisions, including unpublished Second Circuit decisions, with some frequency.[4] Moreover, despite the Second Circuit's rule instructing that its unpublished decisions should not be cited, 2d Cir. R. 0.23, courts (including the Second Circuit itself) in fact frequently cite such opinions as persuasive precedent.[5] In short, the fact that the Second Circuit chose not to publish should not dissuade this Court from granting review. To the contrary, the fact that the Second Circuit treated a claim of the extortionate use of eminent domain as an easy and obvious example of public purpose, not even worth publication, should encourage the Court to grant review.

C. This Case Provides The Court With An Opportunity To Clarify An Important Issue Explicitly Left Open In *Kelo*.

Petitioners ask this Court to clarify an issue referred to but not directly addressed in *Kelo* – whether courts can review a claim that a particular taking within a redevelopment area has a purely private purpose. *See* Pet. Br. 10-11.

Petitioners believe there are two separate steps to public use analysis when there is "an integrated development plan": (1) whether the original redevelopment plan and authorization of eminent domain is proper and

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[4] *See, e.g., Banks v. Dretke*, 540 U.S. 668, 687 (2004) (reviewing unpublished Fifth Circuit decision); *Cooper Indus. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 430 (2001) (reviewing unpublished Ninth Circuit decision); *Blum v. Stenson*, 465 U.S. 886, 891 (1984) (upholding unpublished Second Circuit oral opinion from the bench); *Bifulco v. United States*, 447 U.S. 381, 385 (1980) (overturning unpublished Second Circuit order); *Branti v. Finkel*, 445 U.S. 507, 509 (1980) (reviewing unpublished Second Circuit memorandum opinion).

[5] *See, e.g., Stewart v. Wolfenbarger*, 468 F.3d 338, 352 (6th Cir. 2006); *United States v. Wise*, 447 F.3d 440, 446 (5th Cir. 2006); *Cirilo-Munoz v. United States*, 404 F.3d 527, 533 (1st Cir. 2005); *Opals on Ice Lingerie v. Bodylines, Inc.*, 320 F.3d 362, 368 (2d Cir. 2003) (citing *Herman Miller, Inc. v. Worth Capital*, 1999 U.S. App. LEXIS 3837, 1999 WL 132183, at *1 (2d Cir. 1999) (summary order)).

for an overall public use and (2) whether the particular condemnation actually had a purely private purpose, with any claim of public purpose being merely pretextual. The Second Circuit held (and Respondents argue) that there is no second step. If the original redevelopment designation is valid, no further judicial review is possible, case closed. *Didden*, 173 Fed. Appx. at 933. If, however, there is a second step in which an owner may argue that the evidence shows a purely private purpose in taking his property, then Petitioners' claims should not have been dismissed.

Respondents argue that this question has been resolved by a series of cases from this and other courts holding that the necessity of inclusion of a particular property within a redevelopment area, the necessity of condemnation of a particular property for a project, or the quantity of land taken are not proper subjects for judicial review. *See* Resp. Br. 16-20.

But this case is not a challenge to necessity or the setting of project area boundary lines. Petitioners argue that the taking of their property was pretextual and had a private purpose, that it was motivated by private greed and a desire to maximize the developer's private profits. Neither *Kelo* nor *Berman* involved allegations like the ones in this case of specific and malicious private motivation in taking property.

Kelo suggested that there could be cases where there is a plausible claim of private purpose and pretextual taking. *See* 125 S. Ct. at 2661 ("Nor would the City be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit."). Courts from many other jurisdictions agree. *See* Pet. Br. 12-13; Br. for Law Professors *Amici Curiae* 10-12 (collecting cases and discussing conflict between the Second Circuit's decision in this case and *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996)). Yet in this case, the lower courts instead dismissed the claims without hearing them or giving the owners an opportunity to substantiate their allegations. This case thus presents the Court with an opportunity to give substance to its brief discussion in

Kelo and explain whether courts may consider claims of private and pretextual takings within redevelopment areas.

II. THIS COURT SHOULD RESOLVE THE CIRCUIT SPLIT REGARDING THE STANDARD OF REVIEW OF CASH EXACTIONS.

Petitioners believe that the demand for $800,000 as a condition of not having their property taken by eminent domain was an unconstitutional exaction that did not satisfy the "substantial nexus" requirement laid out in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994).[6] Both the Southern District and the Second Circuit ruled that there was no unconstitutional exaction. *Didden v. Vill. of Port Chester*, 322 F. Supp. 2d 385, 389 (2004); *Didden*, 173 Fed. Appx. at 933. As explained in Petitioners' opening brief, the federal courts have tended to limit the scope of the *Nollan/Dolan* substantial nexus requirement to demands for interest in real property. Pet. Br. 19 (citing cases). Many state supreme courts, on the other hand, have found cash demands to be exactions and have applied the *Nollan/Dolan* test. Pet. Br. 20 (citing cases). There is a plain split among the lower courts as to whether *Nollan/Dolan* should apply to demands for cash in exchange for engaging or not engaging in a discretionary government action. That is why Petitioners have asked this Court to review the issue and resolve the decade-long split of authority.

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[6] In yet another utterly incorrect statement, Respondents assert that Petitioners did not plead this cause of action in their Complaint. Resp. Br. 20. In fact, the Amended Complaint goes far beyond minimum pleading requirements. Petitioners pled violations of public use, procedural due process, and substantive due process, Am. Compl. ¶¶ 74-75, 78-79, 82-83, and stated quite specifically that the developer was "using the Condemnation Proceeding *to exact a payment* from Plaintiffs or coerce some other financial arrangement to which they are not lawfully entitled." *See* Am. Compl. ¶ 64 (emphasis added). Moreover, the claim that the $800,000 demand was an unconstitutional exaction was briefed and decided at each stage of this litigation.

The points made by Respondents cannot even be called a response, as they entirely fail to address Petitioners' argument. Respondents do not deny that there is a split among the lower courts or a need for greater doctrinal clarity. *See* Resp. Br. 20-26. Instead, they argue (1) that there was no exaction because the Village could simply have condemned with no negotiations; (2) the $800,000 demand was a reasonable negotiation offer; (3) Petitioners did not properly allege state action; and (4) Petitioners have no basis for complaining about the Village's failure to process their rezoning application.

Respondents' points are all utterly irrelevant. In brief, (1) all exaction claims, including this one, involve demands in exchange for the government taking or not taking an action within government discretion; (2) Respondents may attempt to prove a substantial nexus at trial, but factual claims of reasonableness are not relevant to a motion to dismiss nor to whether this Court should accept review; (3) Petitioners plainly alleged state action; (4) Petitioners made no arguments to this Court that have anything to do with a rezoning application.

First, all claims of unconstitutional exaction involve situations where there is no obligation to negotiate and the government has "discretion[]" to take one action or another.[7] *See Dolan*, 512 U.S. at 385. Illustrating this principle, this Court in *Nollan* explained that, while a locality could surely use its police power to entirely forbid shouting fire in a crowded theater, it could not "requir[e] a $100 tax contribution in order to shout fire." *Nollan*, 483 U.S. at 837. Thus, even if the Respondents could have taken Petitioners' property without any negotiation, that does not mean that Respondents could use their power to extract improper

[7] The district court's holding that there is no problem when a person acting under color of state law demands cash in exchange for exercising or not exercising government authority is patently ridiculous. *See* Br. for Pacific Legal Foundation as *Amicus Curiae* 4-11. If the district court were correct, then *Nollan*, *Dolan*, and every other exaction case and unconstitutional conditions case have been wrongly decided.

concessions from Petitioners. Petitioners' claim is that, even if Respondents had the authority to condemn their property, the exaction of $800,000 in exchange for not taking their property violated the Constitution.

Second, Respondents' comments about the reasonableness of the demand in light of various governmental and developer obligations might be appropriate on remand but are wholly inapposite on an appeal from a motion to dismiss. Respondents complain that Petitioners are unfairly "characteriz[ing]" the $800,000 demand, when really it was a quite reasonable and benevolent settlement offer. Resp. Br. 23. On a motion to dismiss, however, the courts do in fact take as true the plaintiff's characterization of events, not the defendant's.[8] *E.g.*, *H. J., Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 249 (1989).

Third, the claim that Petitioners didn't allege state action is absurd. *See* Resp. Br. 23. They alleged in their Amended Complaint that they met with the developer at the instruction of the Village; that in response to Petitioners' complaints about the attempted extortion, the Village's Special Counsel told Petitioners they would have to reach agreement with the developer and that they should communicate with the developer through him (the Special Counsel); and that the developer both "cause[d]" and "control[led]" the condemnation proceedings. Am. Compl. ¶¶ 48, 56, 60 (reproduced in Pet. Br. 5-6 n.3); *see also* Am. Compl. ¶¶ 51-52, 54 (describing Petitioners' complaints to Village about extortion attempt). These allegations amply satisfy the pleading requirement for state action.

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[8] Respondents absurdly suggest that the Village's and developer's motivations and the nature of the events and conversations that actually took place can all be inferred, presumably as a matter of law, from the face of a 200-page contract. Resp. Br. 23. They also rely on findings of the district court on the motion for preliminary injunction, another plainly improper legal maneuver. Resp. Br. 24. *Cf. Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981) ("[T]he findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits.").

Finally, the last point of Respondents' brief is incomprehensible to Petitioners, as they have not asked this Court to consider anything about their rezoning application. *See* Resp. Br. 2, 25.

In short, the question of the nature of constitutional limitations on demands for cash in exchange for discretionary government action is a subject of deep division in the lower courts. As discussed in the amicus brief by Pacific Legal Foundation, abusive demands for cash are an increasing problem in local government. Br. of Pacific Legal Foundation as *Amicus Curiae* 11-16. This is a perfect time for the Court to consider the proper application of the exaction doctrine and to clarify how courts should analyze these claims in the future. Respondents have said nothing that should have the slightest bearing on this Court's decision whether to grant review.

CONCLUSION

Sweeping away all the legal niceties, this case raises a stark question – is there anything constitutionally wrong with demanding $800,000 in exchange for not taking someone's property by eminent domain, or does the fact that the property sits within a designated redevelopment area preclude any constitutional challenge? To answer this question, this Court should grant Petitioners' request for certiorari.

Respectfully submitted,

KEANE & BEANE P.C.
EDWARD J. PHILLIPS
RICHARD L. O'ROURKE
455 Hamilton Avenue
15th Floor
White Plains, NY 10601
(914) 946-4777

INSTITUTE FOR JUSTICE
WILLIAM H. MELLOR
DANA BERLINER*
ROBERT MCNAMARA
SCOTT G. BULLOCK
901 North Glebe Road
Suite 900
Arlington, VA 22203
(703) 682-9320

* *Counsel of Record*

Counsel for Petitioners